IN THE COURT OF APPEALS OF IOWA

No. 1-415 / 99-1598
Filed November 28, 2001

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CLERK SUPREME COURT

DIXIE ATHEY, Parent and Next Friend of JAMIE KIBBEE,
Plaintiff-Appellant,

vs.

DEAN SPEICHER, d/b/a DEAN'S CONSIGNMENT & PAWN, SCOTT HENRY, KAREN (MILLER) HENRY, Individually and as Next Friend of JOSEPH MILLER,
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Todd Geer, Judge.

Dixie Athey appeals the district court's grant of summary judgment to Scott Henry, the owner of the premises where Athey's son, Jamie Kibbeee, was injured, in this personal injury action. **AFFIRMED.**

Michael M. Pedersen, Waterloo, for appellant.

Thomas P. Peffer of Shuttleworth & Ingersoll, Cedar Rapids, for appellee-Dean Speicher, d/b/a/ Dean's Consignment & Pawn.

Karla J. Shea of Yaglas, McCoy & Riley, Waterloo, for appellee- Scott Henry.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

Dixie Athey sued Scott Henry after her son, Jamie Kibbee, suffered an eye injury while an overnight guest at Henry's residence. In division III of her petition Athey alleged that Henry, as owner of the premises where Jamie was injured,

> owed a duty to Jamie Kibbee to exercise reasonable supervision and control over activities of Joseph Miller, a person said Scott Henry permitted to reside on said premises, particularly with respect to activities said Scott Henry knew or should [have] known presented a danger to others lawfully on the premises because said Joseph Miller was of insufficient age and experience to appreciate the danger or potential harm which might result from the improper handling of [an] instrumentality such as a BB or pellet gun.

Henry denied any liability for Jason's injuries and resulting damages. In his motion for summary judgment Henry argued:

> There is absolutely no evidence that Scott Henry knew or should have known either that he had the ability to control Joseph Miller or that he knew of the necessity and opportunity to exercise such control.

In the absence of such evidence, Henry claimed there were no genuine issues of material fact remaining for trial and Athey's claims should be dismissed.

Athey resisted summary judgment arguing:

> It is not his status of *in loco parentis* that makes Scott Henry liable for the injuries to Jamie Kibbee, it is his status as the possessor of the premises. The court can not say *as a matter of law* that no jury could conclude that Defendant Scott Henry was negligent in failing to protect Jamie Kibbee from injury. Scott Henry knew there was a veritable arsenal on his premises. Guns are inherently dangerous to start with. Had he conducted a reasonable inspection of the guns he *knew* were on the premises, he would have discovered the defective gun he now claims he did not know was on the premises, because that gun was stored in an unlocked gun cabinet with other guns. He knew he had a thirteen-year-old living on his premises, and he knew that this thirteen-year-old had a friend who frequently visited and often stayed overnight. A jury

> could conclude that having an unlocked gun cabinet in a home occupied by children is negligence without more.

In its ruling the trial court noted that Athey's allegations implicated two distinct legal theories of liability—one based on Henry's failure to control the conduct of a third person on his property and the other on Henry's failure to exercise care in the maintenance of his premises for the protection of others.

The trial court's ruling states:

> There is no evidence that Scott Henry knew or should have known that Joseph Miller had a BB gun, or that he was in possession of any gun that evening. There is no evidence that Scott Henry knew or should have known that the gun was defective. There is no evidence that Scott Henry was put on notice of any unusual happenings or potential dangerous situations on the evening in question.

Based on this determination the court concluded that the record failed to generate issues of material fact under either theory, and the court entered summary judgment dismissing Athey's lawsuit against Henry.

Athey's appeal is limited to the propriety of summary judgment as it applies to her premises liability claim. She argues that the trial court erred in "holding as a matter of law that . . . Scott Henry as the possessor of land had no duty to Jamie Kibbee . . . ." Athey also argues the trial court "erred in interpreting the duty of Scott Henry as the possessor of land."

II. Scope of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 4; *Richardson v. The Commodore, Inc.*, 599 N.W.2d 693, 696 (Iowa 1999). The district court correctly enters summary judgment when the record shows no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute and, if not, whether the district court correctly applied the law. *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 276 (Iowa 1996). In considering the record, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Id.* The "genuine issue as to any material fact" requirement means the evidence is such that reasonable minds could differ on how the issue should be resolved. *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 35 (Iowa 1999).

III. The Merits.

Athey's claim against Henry is expressly premised on Henry's status as the possessor of the premises where Jamie was injured. There is no dispute concerning Henry's status or that Jamie was a social guest when he was injured. Although Athey argues otherwise, Jamie's status as a licensee remains a relevant consideration in determining Henry's duty in the context of a true premises liability claim. *Richardson*, 599 N.W.2d at 698 n.3 (status of entrant remains relevant consideration in determining the scope of the possessor of premises' duty of care); *Morgan v. Pe[illegible]ski*, 508 N.W.2d 724, 727 (Iowa 1993) (citing Restatement (Second) of Torts § 330 cmt. h. (1965)) (social guest is a licensee for purposes of premises liability law)).

Henry's duty and resulting liability under these circumstances is controlled by the following rule:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts § 342; *accord Bigalk v. Bigalk*, 540 N.W.2d 247, 248 (Iowa 1995). Unlike the duty owed an invitee, the possessor of land owes no duty to a licensee to inspect the land to discover possible or even probable dangers. Restatement (Second) of Torts § 342 cmt. d (1965).

Our review of the record leads us to the same conclusion as the district court. There is no direct or circumstantial evidence indicating Henry knew of the BB gun or that it was defective. Moreover, Athey's argument that Henry had reason to know these facts is entirely dependent on inspection of the gun cabinet where the BB gun was kept, a duty Henry did not have under these circumstances. *Id.* Because the record fails to disclose any issues of material fact concerning Henry's knowledge of the condition complained of, the district court correctly entered summary judgment dismissing Athey's lawsuit.

We have considered the remaining issues raised and find that they were either not raised below or are controlled by the foregoing determinations.

The judgment of the district court is affirmed.

AFFIRMED.

Miller, J., concurs; Hecht, J., concurs specially.

HECHT, J. (concurring specially)

I concur with the result reached by the majority, but would affirm the district court's decision for a different reason. At this summary judgment juncture, we must determine whether the plaintiff produced substantial evidence tending to prove a condition existed on Henry's land exposing the possessor to liability under Restatement (Second) of Torts § 342 (1965). The majority's analysis focuses narrowly on whether the BB-gun was such a condition on the land and affirms the district court's determination that plaintiff failed to generate substantial evidence tending to prove Henry knew (1) of the BB-gun's presence on the premises or (2) the gun was defective. I believe our determination of whether a "condition" exposing Henry to liability existed on the premises should not focus narrowly on the BB-gun, but instead on the gun cabinet from which it was retrieved. A reasonable fact-finder could conclude from this record that Henry knew the cabinet was unlocked and contained several firearms and ammunition. I would hold that a genuine issue of material fact exists on this record as to whether Henry knew or should have known that the unlocked gun cabinet containing firearms and ammunition posed an unreasonable risk of harm to licensees on the premises. I nonetheless concur in the result reached by the majority because plaintiff failed to generate substantial evidence to support a fact finding that he did not know of the condition and the risk involved. Jamie admitted he knew the BB-gun was shelved in the unlocked gun cabinet in Henry's house and failed to generate a fact question on the issue of whether he knew of the risk posed by the accessible cabinet and its contents. Accordingly, summary judgment was appropriate in this case.